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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN GUNN,

Defendant and Appellant.

D035782

(Super. Ct. No. SCD144476)

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Affirmed in part, reversed in part and remanded with directions.

Kevin Gunn appeals a judgment entered after his jury conviction on two of three counts of robbery (Pen. Code, § 211). Gunn contends: (1) there is insufficient evidence to support the judgment; and (2) the trial court erred by (a) excluding evidence of third party culpability, (b) denying his motion for disclosure of juror identifying information, and (c) denying his motion for new trial. We affirm the judgment, except we reverse the

trial court's orders denying Gunn's motion for disclosure of juror identifying information and motion for new trial, and we remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Kamien Robbery

Shortly before 2:00 p.m. on February 24, 1999, Leonard Kamien, age 71, was walking along Adams Avenue when a black man hit him on the back of his neck, knocking him unconscious. Kamien's assailant took his wallet and walked away. David Schroeder and John Burkholder witnessed the attack while they were driving on Adams Avenue. Schroeder dropped off Burkholder to aid Kamien and then followed the assailant in his truck. As the assailant walked through a backyard, Schroeder told Dennis Loper, who was standing in his yard, to watch the man. Loper watched the man cross his yard. Loper went to his front yard and saw the man drive by in a small, older-model black car. The man pulled the car over to the curb and bent over; as the man drove away he dropped Kamien's wallet out of the car's window. Kamien later found that \$50 was missing from his wallet.

At about 2:11 p.m. that day, Gunn, using a money order, paid \$40 of a \$97.06 SDG&E bill at a store on Adams Avenue.¹ San Diego Police Officer James Troussel responded to a dispatch regarding the Kamien robbery; the dispatch described the

¹ Money orders could be purchased near the store.

assailant, his clothing, and the car he was driving.² Troussel saw a car in the area that matched the description and followed it. After the car made a few turns, Troussel stopped it at about 2:15 p.m. for speeding.³ Gunn was driving the car, a Daihatsu, from which Gunn had to get out of the passenger's door because the driver's door did not open. Gunn was wearing a baseball cap and a black and white plaid shirt. Gunn was cooperative, but agitated, and Troussel released him after Burkholder positively excluded Gunn as the assailant.

At trial Schroeder testified that he was 90 percent certain that Gunn was the assailant. However, before trial Schroeder did not identify Gunn in a photographic lineup as the assailant and described the assailant as six feet tall and wearing dark clothing, a checkered shirt, and a dark baseball cap. At trial Schroeder identified a ripped plaid Pendleton shirt that police found in Gunn's apartment as the shirt the assailant wore.⁴

Burkholder described the assailant as a very big man who was six feet or taller, but he did not identify Gunn as the assailant at trial or before trial during curbside and

² At trial Troussel testified that the dispatch described the assailant as a light-skinned black male wearing a baseball cap and a black and white plaid shirt, and driving a black compact car. However, after listening to a tape of the dispatch, Troussel admitted it did not describe the assailant as light-skinned.

³ At trial Troussel testified that the car's driver made a few turns that possibly were evasive. However, neither the tape of his radio communications with the dispatcher nor the police report of the incident indicated that the driving maneuvers may have been evasive.

⁴ At trial Angela Dearing, Gunn's girlfriend, identified the plaid shirt as Gunn's.

photographic lineups.⁵ Loper positively identified Gunn at the preliminary hearing and at trial as the man he saw walking in his yard and later driving by his house. However, Loper admitted he did not identify Gunn as that man in a photographic lineup conducted on April 9. Loper had described that man to police as a very big guy who was about six feet to six feet three inches tall. At trial he could discern no difference between the shirt found in Gunn's apartment and the shirt that the man in his yard wore. He also identified Dearing's black car in a photograph as the car that the man drove by his house.⁶ Another witness, Vera Brennan, did not identify Gunn as the assailant either in a photographic lineup or at trial. However, she testified that Gunn's figure was very similar to the assailant's in that he was very tall and stocky. She had described the assailant to police as a black man who wore warmup pants, a black shirt, and a hat.

The Pomplin Robbery

At about 10:30 a.m. on March 4, 1999, Carol Pomplin, age 61, was walking along 33rd Street. She believed someone was behind her, felt a blow to the back of her head, and then fell to the ground. Her purse was yanked off her arm and shoulder as she fell. As her assailant walked away, Pomplin got up and yelled for help. She saw him put her purse inside his coat. She followed him to an Arco station where the assailant opened the driver's door of a small, black car from the passenger's side and then got in the driver's

⁵ At trial Gunn's counsel asserted that Gunn was six feet nine inches tall.

⁶ Although Loper reported to police that "C-2-5" were three consecutive numbers on the car's license plate number, Dearing's license plate number was "2 WCR 174."

seat. The assailant had difficulty closing the driver's door and starting the car's engine. Pomplin sought help at the Arco station and a 911 call was made. As police arrived, the assailant drove away in the car.

At trial Pomplin identified Gunn as her assailant. However, she did not identify him as her assailant in a photographic lineup or at Gunn's preliminary hearing.⁷ Pomplin described her assailant to police as very tall with dark African-American hands. At trial she identified Dearing's car as the one her assailant drove away.

Tim Anderson saw the robbery of Pomplin from across the street. He described the assailant as a light-skinned, very large black man who was taller than six feet one inch. At trial Anderson could not positively identify Gunn as the assailant although he testified that Gunn's physique was similar to the assailant's. He identified Dearing's car as the one the assailant drove away from the Arco station. Anderson testified that before the assailant entered the car, he pointed at Anderson and put his forefinger to his lips, which Anderson believed meant he should not say anything.

Rosemary Andaya, the Arco station manager, testified at trial that she saw a very large black man get in a small black car and have trouble with the driver's door and starting the car's engine. Andaya stated that Dearing's car was similar to the one she saw at the station, but she was not positive it was the same car. She described the man as over

⁷ At trial she testified that she recognized Gunn while she was on the witness stand during his preliminary hearing and he turned his face to the left. She was confused as to what she should do and after her preliminary hearing testimony she told a detective in the hallway that she had recognized Gunn as her assailant.

six feet tall, weighing about 250 pounds and having a dark complexion. She did not identify Gunn as that man either at trial or in the photographic lineup.

The Fortunato Robbery

Between noon and 12:30 p.m. on April 6, 1999, Rosetta Fortunato was placing groceries in the trunk of her car, which was parked in a dental building parking lot. Fortunato saw a person coming toward her and was struck on the back of her head. She became unconscious momentarily. After regaining consciousness, Fortunato saw her assailant crossing the street with her purse.

Fortunato testified that she saw her assailant's face before the attack and positively identified Gunn as her assailant at the preliminary hearing and at trial. When shown a photograph of a checkered shirt found in Gunn's apartment, she identified it as the shirt her assailant wore. During a photographic lineup she stated that Gunn and another person looked like the man who attacked her.⁸ She told police that her assailant was taller than six feet.

Donald Stowell saw a man walking toward the dental building parking lot about 15 seconds before he heard a woman scream. Stowell testified that Gunn was identical or similar to the man he saw. He selected Gunn in a photographic lineup as that man. He described the man to police as being very tall--about six feet four inches--and wearing a baseball cap and a jacket.

⁸ She thought the other person looked more like her attacker because he had more hair than Gunn.

John Halloran was across the street from the dental building parking lot when he heard screaming. Halloran saw a man walk out from behind the dental building and then walk west on El Cajon Boulevard. The man looked over his shoulder several times as he crossed the street. Halloran selected Gunn in a photographic lineup as the person who most closely resembled that man. Halloran did not identify Gunn as the man at the preliminary hearing. At trial he could not positively identify Gunn as that man, but stated that Gunn had a similar height and build as that man. Halloran testified that the man wore a checkered Pendleton shirt that was similar to a shirt found in Gunn's apartment. He described the man to police as black and between six feet three inches and six feet four inches tall and wearing a black and white checkered shirt.

Steve Doepker was standing in the parking lot of the Quik Mart convenience store on El Cajon Boulevard when he heard screams coming from behind the dental building. He saw a man come from behind that building, walk down the street, walk across the street and past him, and go into an alley behind the Quik Mart. Doepker selected Gunn in a photographic lineup as that man. At trial Doepker identified Gunn as that man. He testified that the man wore a checkered Pendleton shirt that was similar to a shirt found in Gunn's apartment.

At about 12:30 p.m. that day, taxi cab driver Jackie Robertson was dispatched to the Quik Mart to pick up a passenger. As he approached the store's front entrance, there were police helicopters overhead and police cars driving up and down the street. Gunn quickly came out of the store and got into the cab. Gunn was fidgety and did not give Robertson a destination address. Gunn slumped down in his seat and immediately

removed his checkered, black Pendleton shirt. Robertson testified that shirt was similar to a shirt found in Gunn's apartment. Gunn directed Robertson to drive south on 35th Street across El Cajon Boulevard, turn left one block later on Orange Street, proceed one block past Wilson Avenue, and then turn left into an alley behind Wilson Avenue. Robertson drove up the alley in back of North Park Produce (which was near the dental building parking lot) and dropped Gunn off in the alley at the security gate of an apartment complex at 4269 Wilson Avenue. Robertson selected Gunn in a photographic lineup as that man and positively identified Gunn as that man at the preliminary hearing and at trial.

A surveillance videotape from the Quik Mart showed Gunn entering the store and asking for a cab. Helicopter noise could be heard in the background. When someone asked Gunn what was going on outside, Gunn replied that "there is a man with a gun across the street." Dearing viewed the videotape at trial and identified Gunn as the man shown on the tape wearing a plaid shirt and hat.

Police found Fortunato's purse hidden inside a wheel of a car parked off the alley behind the Quik Mart. Her credit cards and checkbook were found in a dumpster farther down the alley. Police conducted surveillance of Gunn from April 9 through April 16, but terminated their surveillance because Gunn apparently was aware of it.

The Defense Case

Dearing testified that she was Gunn's girlfriend. She owned a black Daihatsu with a damaged driver's door that was inoperative during February 1999. Gunn occasionally drove her car during that period. Dearing lived with Gunn at their Wilson Avenue

apartment from July 1998 until February 24, 1999, when she moved out to stay with her mother. She moved back in with Gunn in mid-March 1999. She testified that on March 4, 1999, she drove her car to work and records showed she worked 13 1/2 hours that day. She did not allow Gunn to drive her car during the period she lived with her mother. She testified that Gunn did not work during February, March, or April 1999, except for occasional part-time jobs. Their Wilson Avenue apartment was about a five minute walk from the Quik Mart store. She was convicted of welfare fraud felonies in 1994 and 1996.

Gloria Dearing, Dearing's mother, testified that Dearing lived with her for two and one-half to three weeks in late February 1999. During that period, Dearing drove her car to work.

The Information and Verdict

An information charged Gunn with the robberies of Kamien, Pomplin and Fortunato. It alleged that Gunn had two prior serious or violent felonies under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and two prior serious felonies (Pen. Code, §§ 667, subd. (a)(2), 1192.7, subd. (c)).

The jury convicted Gunn of the robberies of Pomplin and Fortunato and was unable to reach a verdict (on a 9-3 vote in favor of conviction) on the alleged Kamien robbery. The trial court declared a mistrial on the charge of robbery of Kamien. Gunn admitted the truth of the allegations of the first prior strike conviction and first prior serious felony conviction, and the trial court granted the prosecution's motion to dismiss

the allegations of the second prior strike conviction and second prior serious felony conviction. The trial court sentenced Gunn to a total prison term of 17 years.

Gunn timely filed a notice of appeal.

DISCUSSION

I

There Is Substantial Evidence to Support Gunn's Robbery Convictions

Gunn contends there is insufficient evidence to support his convictions for the robberies of Pomplin and Fortunato.

A

A judgment of conviction must be reversed if the record does not contain substantial evidence to support it. (*People v. Towler* (1982) 31 Cal.3d 105, 117-118; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) *People v. Cuevas* (1995) 12 Cal.4th 252 described the substantial evidence standard of review set forth in *Johnson*:

"Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*--that is, evidence [that] is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on 'isolated bits of evidence.'" [Citation.]" (*Id.* at pp. 260-261, original italics.)

The same standard of review applies whether the conviction is based solely or primarily on circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) It also applies to "claims of alleged deficiencies in proof of identity." (*People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25, disapproved on another ground as noted in *People v.*

Rowland (1992) 4 Cal.4th 238, 260.) Identification of an assailant is a question for the trier of fact and its determination of that question must be sustained on appeal if there is substantial evidence to support it. (*People v. Rist* (1976) 16 Cal.3d 211, 216, superseded by constitutional amendment on another ground as noted in *People v. Collins* (1986) 42 Cal.3d 378, 393.) *People v. Lindsay* (1964) 227 Cal.App.2d 482 stated:

"The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters [that] go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury The general rule, then, is that it is not essential that a witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime, and the want of positiveness goes only to the weight of the testimony. [Citations.] Our courts have held that it is not necessary that any of the witnesses called to identify the accused should have seen his face. [Citation.] Identification based on other peculiarities may be reasonably sure. Consequently, the identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing. [Citations.]" (*Id.* at pp. 493-494.)

In applying the substantial evidence standard of review, "an appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

B

We conclude there is substantial evidence to support the jury's findings that Gunn committed the robberies of Pomplin and Fortunato. Regarding the Pomplin robbery, at

trial Pomplin identified Gunn as her assailant. Although at his preliminary hearing Pomplin did not testify that Gunn was her assailant, immediately after her testimony she informed a detective that she recognized him as her assailant. Pomplin followed Gunn to the Arco station and testified at trial that Gunn drove away in the small black car with an inoperative driver's door identical to Dearing's car. Gunn previously had been stopped by police while he was driving Dearing's car after the alleged Kamien robbery. Although neither Anderson nor Andaya positively identified Gunn as the driver of the small black car, they described the driver to police as a very large black man who was over six feet tall. Their descriptions of that driver were *not* significantly inconsistent with Gunn's appearance. Although Gunn is much taller than six feet, apparently being six feet nine inches in height, eyewitnesses' estimates of persons' heights cannot be expected to be entirely accurate, but are at best approximations. Furthermore, although Pomplin and Andaya did not identify Gunn in a photographic lineup, that factor does not disprove that Gunn committed the robbery. Rather, any lack of certainty in the eyewitnesses' identifications of Pomplin's assailant or inconsistencies in their descriptions of him were properly weighed by the jury with all of the evidence that incriminated him as Pomplin's assailant. (*People v. Rist, supra*, 16 Cal.3d at p. 216; *People v. Lindsay, supra*, 227 Cal.App.2d at pp. 493-494.) Considering the entire record favorably to support the jury's verdict, we conclude there is substantial evidence to support the jury's finding that Gunn committed the Pomplin robbery. (*People v. Cuevas, supra*, 12 Cal.4th at pp. 260-261; *People v. Johnson, supra*, 26 Cal.3d at p. 576.)

Regarding the Fortunato robbery, Fortunato identified Gunn as her assailant at the preliminary hearing and at trial. In a photographic lineup she selected Gunn's and another man's photographs from a photographic lineup as men who appeared similar to her assailant. She identified Gunn's checkered shirt as the shirt her assailant wore. She described her assailant as being over six feet tall. Stowell testified that Gunn was identical or similar to the man he saw immediately before Pomplin's screams and selected Gunn in a photographic lineup as that man. Halloran selected Gunn in a photographic lineup as the person who most closely resembled the man he saw walk out from behind the dental building. Although Halloran did not positively identify Gunn as the man at the preliminary hearing or at trial, he testified at trial that Gunn had a similar height and build as that man. Halloran testified that the man wore a checkered Pendleton shirt that was similar to the shirt found in Gunn's apartment. At trial Doepker identified Gunn as the man he saw come out from behind the dental building, walk past him, and go into an alley behind the Quik Mart. Doepker also selected Gunn in a photographic lineup as that man. He testified that the man wore a checkered Pendleton shirt similar to the shirt found in Gunn's apartment. Robertson selected Gunn in a photographic lineup as the man he picked up at the Quik Mart and positively identified Gunn as that man at the preliminary hearing and at trial. Furthermore, Robertson testified on Gunn's suspicious actions in quickly entering his cab while police helicopters were overhead, slumping down in his seat, immediately removing his checkered shirt, and directing Robertson on a circuitous route to an alley behind an apartment building only a few blocks away. Gunn's conduct supports an inference that he was conscious of his guilt. Dearing testified that she lived

with Gunn at that apartment building during that period. The Quik Mart videotape showed Gunn apparently attempting to deflect suspicion from himself when he stated that the helicopter noise was because of a man with a gun across the street. Also, police found Fortunato's purse in the wheel of a car in the alley behind the Quik Mart, which alley Doecker saw Gunn enter. Considering the entire record favorably to support the jury's verdict, we conclude there is substantial evidence to support the jury's verdict that Gunn committed the Fortunato robbery, and any inconsistent or weak identifications or descriptions of Gunn as Fortunato's assailant do not disprove that he committed that robbery. (*People v. Rist, supra*, 16 Cal.3d at p. 216; *People v. Lindsay, supra*, 227 Cal.App.2d at pp. 493-494.)

II

The Trial Court Did Not Err by Excluding Gunn's Purported Third Party Culpability Evidence

Gunn contends the trial court erred by excluding evidence of third party culpability.

A

In February 1999 Michael Burgess was arrested for allegedly committing assaults and robberies on elderly victims and was in custody at the time the three robberies charged against Gunn were committed. Before jury selection in this case, Gunn's counsel stated that he did not intend to blame Burgess for the commission of the three robberies, but wished to question police on their investigative measures used regarding Burgess in comparison to their investigative measures used regarding Gunn. Gunn's counsel stated

that Burgess "obviously could not have committed the robberies that Mr. Gunn is on trial for. . . . [T]here were some investigative measures taken that involve Mr. Burgess that were not undertaken with Mr. Gunn, I mean I may just on cross-examination of the detective go into that, but certainly not with any intent to blame Mr. Burgess for the crimes that Mr. Gunn is on trial for."

The prosecutor objected on Evidence Code section 352 grounds to Gunn's proposed questioning of police regarding their investigative measures taken regarding Burgess. Gunn's counsel stated that police maintained detailed reports of their surveillance of Burgess but not of their surveillance of Gunn. He stated that he was "not offering this evidence [i.e., comparison of surveillance reporting], under a third party culpability defense framework."

The trial court stated that it was not ruling on Gunn's proposed line of questioning and would consider further argument and briefing on the issue before making any ruling. The parties did not thereafter submit briefs on the issue and Gunn did not proffer any evidence showing that a third party was culpable for any of the three robberies with which he was charged. Gunn cross-examined a police detective regarding the lack of police reports on their week-long surveillance of Gunn. Gunn did not question the detective on detailed reports maintained on police surveillance of Burgess or other suspects.

B

Gunn asserts the trial court erred by excluding third party culpability evidence, arguing "[t]he jury should have been allowed to hear what law enforcement did in other

investigations, and compare it to the perfunctory methods used regarding [Gunn]."

However, Gunn did not proffer any third party culpability evidence and the trial court did not make any definitive ruling on the admissibility of the evidence or permissible questioning of police on their surveillance of Gunn as compared to other suspects.⁹

Accordingly, Gunn waived this issue for purposes of appeal. (*People v. Davis* (1995) 10 Cal.4th 463, 502; *People v. Pride* (1992) 3 Cal.4th 195, 235; *People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6; Evid. Code, § 354.)

Assuming arguendo Gunn proffered third party culpability evidence and the trial court excluded it, we conclude the trial court did not abuse its discretion by excluding it under Evidence Code section 352. (*People v. Davis, supra*, 10 Cal.4th at p. 502; *People v. Hall, supra*, 41 Cal.3d at pp. 834-835.) The trial court could have reasonably found that the probative value of evidence that there were other suspects investigated for committing the three robberies or that police maintained detailed reports on their surveillance of suspects other than Gunn was substantially outweighed by undue consumption of time or a substantial danger of undue prejudice or of misleading the jury. (Evid. Code, § 352.) Furthermore, assuming arguendo the trial court erred by excluding that evidence, Gunn does not carry his appellate burden to show that it is reasonably probable that he would have received a more favorable result had the court not committed

⁹ Gunn did not proffer any evidence linking a third person either circumstantially or directly to the perpetration of any of the three robberies and therefore did not show that a reasonable doubt existed concerning his guilt. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Hall* (1986) 41 Cal.3d 826, 833.)

the assumed error. (*People v. Bradford, supra*, 15 Cal.4th at p. 1325; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

The Trial Court Erred by Denying Gunn's Motion for Disclosure of Juror Identifying Information

Gunn contends the trial court erred by denying his motion for disclosure of juror identifying information.

A

After the jury returned its verdict, Gunn filed a motion requesting that the trial court disclose juror identifying information to him. Gunn's motion argued that a juror's letter to the San Diego County District Attorney showed that there were issues he needed to investigate and discuss with the jurors for him to prepare a motion for new trial. On September 18, 1999, one day after the jury returned its verdict, the jury's foreperson wrote a letter to Paul Pfingst, the San Diego County District Attorney, to complain of the prosecutor's presentation of the People's case against Gunn. The juror wrote in part:

"Lack of time or overwork can not be allowed to be an excuse for sloppy prosecution[,] especially in a case where lack of conviction puts a dangerous criminal back on the streets[,] as was nearly the case here."

The letter criticized the prosecutor's confusing presentation of evidence and the lack of expert witness testimony on eyewitness identifications and perceptions of height. He stated: "Obviously the jury was aware that people have difficulties in estimating heights- however, it was left to the jurors to raise the issue of estimating [the] height of [someone] seated." He discussed specific factual issues and evidentiary discrepancies where there

was a lack of evidence that could have helped the prosecution's case. The juror's letter concluded: "Based on the prosecutor's performance, *had the jury been less proactive or less intelligent there would not have been a conviction and a dangerous criminal would be back on the streets.* [¶] **Neither overwork nor public service is an excuse for substandard performance.**" (Original italics and bold type.)

Gunn argued that the juror's letter showed the jury "was troubled by the lack of evidence" and convicted him only because the jurors were "proactive." Gunn asserted that the information contained in the juror's letter constituted a prima facie showing of good cause for disclosure of juror identifying information.

The trial court denied Gunn's motion for disclosure of juror identifying information, finding that Gunn did not make the required showing of good cause for disclosure under Code of Civil Procedure sections 206 and 237.¹⁰ The court did not interpret that letter as implying the jury convicted Gunn without sufficient evidence. The court stated: "[T]he [juror's] letter . . . in my opinion show[s] no evidence of jury misconduct. There is no evidence of statements or conduct I feel in the [juror's] letter that would go to issues of jury misconduct."

B

Section 206, subdivision (g) provides that a defendant may file a motion for disclosure of jurors' identifying information:

¹⁰ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

"Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237."

Section 237 provides the standards and procedures for a defendant's motion to request disclosure of jurors' identifying information, stating in pertinent part:

"(a)(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors . . . consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section. [¶] . . . [¶]

"(b) Any person may petition the court for access to these records. *The petition shall be supported by a declaration that includes facts sufficient to establish good cause* for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. . . ." (Italics added.)

Sections 206 and 237 "maximize juror privacy and safety, while retaining a criminal defendant's ability to contact jurors after the trial if sufficient need is shown." (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087.) "A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict." (*People v. Cox* (1991) 53 Cal.3d 618, 698-699.)

Before 1992 when section 206 was amended and section 237 was enacted, courts "possessed the inherent judicial power to limit the parties' ability to contact jurors

following completion of the trial." (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1094, fn. omitted.) *People v. Jones* (1998) 17 Cal.4th 279, 317 cited with approval the holding in *People v. Rhodes* (1989) 212 Cal.App.3d 541, 551-552:

" '[C]ounsel for a convicted defendant is entitled to the list of jurors who served in the case, including addresses and telephone numbers, *if the defendant sets forth a sufficient showing to support a reasonable belief that jury misconduct occurred*, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial.' [Citation.]" (Italics added.)

We believe, and the parties apparently do not dispute, that the *Rhodes* standard is consistent with and substantially the same as the good cause showing required by section 237, subdivision (b). (*Townsel v. Superior Court*, *supra*, at p. 1096, fn. 4; *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1321, fn. 8; *People v. Wilson* (1996) 43 Cal.App.4th 839, 850-852; *People v. Granish* (1996) 41 Cal.App.4th 1117, 1126-1132.)¹¹

As Gunn notes, a trial court's denial of a defendant's motion for disclosure of juror identifying information is reviewed on appeal under the abuse of discretion standard. (*People v. Townsel*, *supra*, 20 Cal.4th at p. 1096; *People v. Jones*, *supra*, 17 Cal.4th at p. 317.)

¹¹ Although Gunn cites various constitutional provisions in his brief, he does not substantively argue, or persuade us, that a criminal defendant has a right to juror identifying information broader than that provided under sections 206 and 237 and *People v. Rhodes*, *supra*, 212 Cal.App.3d at pages 551-552.

C

We conclude Gunn made the required prima facie showing of good cause for disclosure of the jurors' identifying information. Gunn's motion for disclosure relied on the content of the juror's letter to establish a prima facie showing of good cause. The letter's statement that "had the jury been less proactive or less intelligent there would not have been a conviction," together with other statements in the letter, support a reasonable inference that there *may* have been jury bias or misconduct. Although the juror's letter by itself does not show conclusively either that the jury was biased or that the jury committed misconduct by convicting Gunn without sufficient evidence, it can reasonably be inferred from the letter's statements that the jurors may have engaged in improper actions in "proactively" deciding Gunn's guilt or innocence. Gunn should be given a reasonable opportunity to contact the jurors and determine whether there was, in fact, any juror bias or misconduct.

Because the statements in the juror's letter support a reasonable inference or belief that there may have been jury bias or misconduct, the trial court erred by finding that Gunn did not make the required prima facie showing of good cause for disclosure of the jurors' identifying information. (§ 237, subd. (b); *People v. Rhodes*, *supra*, 212 Cal.App.3d at pp. 551-552.) Therefore, the court abused its discretion by denying Gunn's motion for disclosure of juror identifying information. (*People v. Townsel*, *supra*, 20 Cal.4th at p. 1096; *People v. Jones*, *supra*, 17 Cal.4th at p. 317.) On remand, the trial court shall issue a new order granting Gunn's request and shall release to Gunn's counsel personal juror identifying information regarding the jurors in this case. Gunn shall then

have 60 days after that release of information to conduct an investigation and file a new motion for new trial based solely on the ground of juror bias and/or misconduct. If a new motion for new trial is not filed within that time period, the trial court's current order denying the motion for new trial shall be reinstated and the judgment affirmed in its entirety.

IV

The Trial Court Erred by Denying Gunn's Motion for New Trial Without Granting His Motion for Disclosure of Juror Identifying Information

Gunn contends the trial court erred by denying his motion for new trial on grounds that: (1) the prosecution committed a *Brady*¹² violation by not timely disclosing exculpatory evidence; (2) the prosecution committed misconduct by introducing false testimony; and (3) a biased jury convicted him without sufficient evidence and the trial court should have granted his request for juror identifying information.

A

Gunn filed a motion for new trial on the grounds that the jury's verdict was contrary to the law and evidence, the jury was not impartial and relied on evidence not presented at trial, and that police misconduct and perjury denied him a fair trial. The trial court denied Gunn's motion, finding that in its independent judgment there was sufficient evidence to support the jury's verdict, that it could not speculate on the jury's thought processes and reasoning, that exculpatory evidence was disclosed and addressed during

¹² *Brady v. Maryland* (1963) 373 U.S. 83.

trial, and that any police misconduct related only to the Kamien robbery charge for which a mistrial was declared.

A trial court has discretion whether to grant or deny a motion for new trial under Penal Code section 1181 and we must affirm the court's decision unless it abused its discretion. (*People v. Davis, supra*, 10 Cal.4th at p. 524; *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Williams* (1988) 45 Cal.3d 1268, 1318.)

B

Brady v. Maryland, supra, 373 U.S. 83 and its progeny hold that the prosecution has a due process obligation to disclose to the defense before trial all material exculpatory evidence. (*Kyles v. Whitley* (1995) 514 U.S. 419, 423-434; *United States v. Bagley* (1985) 473 U.S. 667, 674-678.) The prosecution has a duty to disclose evidence both favorable to the defendant and material to either guilt or punishment. (*United States v. Bagley, supra*, at p. 674; *In re Sassounian* (1995) 9 Cal.4th 535, 543.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.] [¶] Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.]" (*In re Sassounian, supra*, at p. 544.) Alternatively stated, evidence is material if its suppression undermines confidence in the verdict. (*Id.* at p. 545, fn. 7; *United States v. Bagley, supra*, at p. 678.) There is no *Brady* violation for delayed disclosure if the defense receives the information in time to use it at trial and is not prejudiced by the delay. (*United States v. Derr* (D.C. Cir. 1993) 990 F.2d 1330,

1335-1336; *United States v. Diaz* (2d Cir. 1990) 922 F.2d 998, 1007; *People v. Robinson* (1995) 31 Cal.App.4th 494, 499-500; *People v. Wright* (1985) 39 Cal.3d 576, 590-591.)

In this case the prosecution did not disclose to Gunn before trial that police showed Loper a photographic lineup and that Loper did not select Gunn's photograph as the man he saw walk across his lawn and drive by his house. At trial Loper positively identified Gunn as the man and testified that he was shown a photographic lineup by police. Detective Chris Meaux testified that he showed a photographic lineup to Loper on April 9, 1999. Out of the jury's presence, the trial court and counsel discussed the fact that the prosecution had not provided the defense with documents regarding the photographic lineup shown to Loper. Meaux's testimony was continued until the following week so the prosecution could provide Gunn with the report of the photographic lineup shown to Loper. On Gunn's cross-examination of Meaux after he was recalled, Meaux confirmed that his testimony was continued so he could provide a copy of the report of Loper's photographic lineup to the prosecutor, who in turn provided a copy to Gunn. The prosecutor's direct examination of Meaux revealed that Meaux had shown Loper a photographic lineup and Loper selected a photograph of a person other than Gunn whom he was 70 to 80 percent certain was the man he saw and Loper excluded all other persons, including Gunn, as that man. Gunn cross-examined Meaux on the circumstances and results of the photographic lineup shown to Loper and what Meaux did with his report of the lineup. Meaux testified that he left a copy of his report on Detective Griffin's desk on April 13, 1999.

We conclude that the trial court correctly found the prosecution's delayed disclosure of information on the showing to Loper of the photographic lineup did not violate Gunn's constitutional due process rights under *Brady*. Gunn received that information during trial and it was presented to the jury. On cross-examination of Meaux, Gunn used this information to show that Loper had selected in the photographic lineup another person that he was 70 to 80 percent certain was the man he saw and had excluded Gunn as that man. There is no *Brady* violation for delayed disclosure if the defense receives the information in time to use it at trial and is not prejudiced by the delay. (*United States v. Derr, supra*, 990 F.2d at pp. 1335-1336; *United States v. Diaz, supra*, 922 F.2d at p. 1007; *People v. Robinson, supra*, 31 Cal.App.4th at pp. 499-500; *People v. Wright, supra*, 39 Cal.3d at pp. 590-591.) This case is similar to *Wright* in which the defense received delayed disclosure of the information and was allowed to reopen its case and present evidence based on that information. (*Ibid.*) In this case, as in *Wright*, the additional information was presented to the jury so it could be considered in its deliberations. Furthermore, Gunn does not show that the information belatedly disclosed was *material* under *Brady*. Evidence is material only if there is a reasonable probability that, had it been disclosed to the defense, the result would have been different, or if suppression of the information undermines our confidence in the verdict. (*In re Sassounian, supra*, 9 Cal.4th at pp. 544, 545, fn. 7; *United States v. Bagley, supra*, 473 U.S. at p. 678.) Because there was a mistrial declared on the Kamien robbery charge, to which the Loper photographic lineup evidence directly related, Gunn could not have received a more favorable result on that charge. Also, Gunn does not show that it is

reasonably probable he would have been found not guilty of either of the Pomplin or Fortunato robberies had the Loper photographic lineup evidence been disclosed earlier by the prosecution. The prosecution's belated disclosure of that evidence also does not undermine our confidence in the verdict. Therefore, there was no *Brady* violation committed by the prosecution.

C

Gunn asserts that the prosecution committed misconduct by presenting false testimony by Officer Troussel. Troussel testified that he stopped Gunn's car shortly after the Kamien robbery because he received a dispatch describing that the robber as a light-skinned, tall black man wearing a black and white shirt and Gunn matched that description and was speeding and making turns that were possibly evasive. Troussel testified that the car "made a few turns" and that it "[l]ooked to us like he was trying to maybe evade us, but not with a lot of vigor." The report of the stop (which was prepared by Officer Dunnigan) did not mention any possibly evasive maneuvers taken by Gunn. On cross-examination of Troussel, Gunn played the audio tape of communications between the police dispatcher and Troussel. The dispatch did not describe the robber as light-skinned. After Troussel stopped Gunn, the dispatcher provided a further description of the robber as having a medium complexion. After hearing the dispatch tape, Troussel admitted that prior to the stop he did not have information that the robber was a "light-skinned" black man. Furthermore, the tape showed Troussel did not report to the dispatcher the possibly evasive maneuvers taken by Gunn. Gunn cross-examined Troussel on the turns he saw the car make before he stopped it. Troussel testified that he

did not fabricate the fact that Gunn made turns or that he received information that the robbery suspect was a light-skinned black man. He stated that there also are radio communications among patrol cars and officers that are not reflected on dispatch tapes.

We conclude the record supports a finding by the trial court that Gunn did not show either that Troussel committed perjury or that the prosecutor knowingly presented perjured testimony. The absence in the dispatch tape of a reference to the light-skinned characteristic of the black male suspect does not show that Troussel did not have that information at the time he stopped Gunn. As Troussel testified, there were other radio communications among police that could have provided him with that information. Furthermore, assuming Troussel did not in fact have that information, he could have innocently misrecalled the information he had at the time of the stop. Therefore, Gunn did not show that Troussel committed perjury by testifying he was informed before the traffic stop that the suspect was light-skinned. Similarly, the absence of references in the dispatch tape and police report regarding the turns Gunn's car made that were possibly evasive does not show Gunn did not make those turns or maneuvers. Furthermore, whether Troussel considered those turns to be possibly evasive was a matter of his opinion rather than fact, and Gunn does not show that Troussel falsely stated his opinion. Also, Troussel did not write the police report of the traffic stop and could have innocently misrecalled the turns Gunn made over six months before the trial. Therefore, Gunn did not show that Troussel committed perjury by testifying that Gunn's car made a few turns that were possibly evasive. Gunn did not show that Troussel's statements were false, that he knew his statements were false, or that he specifically intended to testify

falsely under oath. (CALJIC No. 7.20.) Even assuming Troussel intentionally testified falsely, Gunn did not show that the prosecutor knew that Troussel would or did testify falsely. Police reports and dispatch tapes do not necessarily contain all of the information that a police officer receives or observes. The prosecutor in this case may have properly believed that Troussel's testimony was truthful even though its substance was not reflected in the dispatch tape or police report. Therefore, Gunn did not show that the prosecutor committed misconduct. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) In any event, Gunn did not show that he would have received a more favorable verdict had Troussel's purportedly false testimony been excluded. (*In re Malone* (1996) 12 Cal.4th 935, 965.)

D

Gunn also asserts he was convicted by a biased jury without sufficient evidence to support its verdict. He cites the letter sent by the jury's foreperson as support for his assertion.

In denying Gunn's motion for new trial, the trial court concluded that the juror's letter did not raise any issue of jury misconduct. Although the juror's letter by itself does *not* show conclusively either that the jury was biased or that the jury convicted him without sufficient evidence, we concluded in part III.C., *ante*, that the letter's statements could support a reasonable inference that the jury may have been biased or decided to convict him of the two robberies without sufficient evidence in the record, and therefore the trial court erred by denying Gunn's motion for juror identifying information.

Therefore, the trial court erred by denying Gunn's motion for new trial without first

granting his request for juror identifying information and allowing Gunn a reasonable opportunity to conduct an investigation on possible juror bias and/or misconduct.

DISPOSITION

The orders denying the motion for disclosure of juror identifying information and motion for new trial are reversed and the judgment is affirmed in all other respects. The matter is remanded with directions for further proceedings consistent with this opinion.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.